

BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

C.R. ENGLAND, INC.

Employer

And

Case 13-RC-095967

TEAMSTERS, LOCAL 705,

Petitioner

EXCEPTIONS OF EMPLOYER TO PURPORTED REGIONAL
DIRECTOR PETER ORR'S REPORT ON OBJECTIONS

Pursuant to Section 102.69 of the Board's Rules and Regulations and Footnote No. 4 of purported Regional Director Peter Orr's Report on Objections and Notice of Hearing ("Report on Objections"), dated March 15, 2013, and the purported Director's Erratum to Report on Objections and Notice of Hearing, dated March 19, 2013, Employer excepts to the purported Director's disposition of Objection # 1 and "the conclusion and the recommendation of the [purported Director] that Employer Objection # 1 be overruled."

In support of these Exceptions, Employer relies upon and incorporates by reference the attached "Memorandum of Law in Support of Employer's Objections to Election Due to Invalid Appointment and Lack of Authority of Regional Director to Conduct and Supervise a Valid Election Under Sections 9 and 3(B) of the NLRA," dated February 26, 2013. None of the substantive arguments in Employer's Memorandum were addressed in the purported Regional Director's Report on Objections, except to the limited extent that the Report argues that "there is a strong public interest in addressing

representation disputes as soon as possible” Report, page 3. Employer does not quarrel with this notion generally, but the purported Regional Director’s argument is no basis for rejecting the substantive arguments made in the attached Employer Memorandum of Law regarding the current lack of authority of the purported Regional Director and indeed of the current purported Board itself to adjudicate the issues raised in the current case.

Employer asks that this entire proceeding be held in abeyance until there is a regional director who is validly appointed in Region 13 by a valid Board for the purpose of conducting the representation case functions of the Board. If and when a valid regional director is appointed by a valid Board, for the purpose of conducting the representation case functions in this case, the previously-held, invalid election should be rerun.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark B. Goodwin". The signature is written in a cursive, flowing style.

Mark. B. Goodwin
Counsel for Employer C.R. England

March 27, 2013

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

C.R. ENGLAND, INC

Employer

Case 13-RC-095967

And

TEAMSTERS LOCAL 705

MEMORANDUM OF LAW IN SUPPORT OF EMPLOYER'S
OBJECTIONS TO ELECTION DUE TO INVALID APPOINTMENT
AND LACK OF AUTHORITY OF REGIONAL DIRECTOR TO
CONDUCT AND SUPERVISE A VALID ELECTION UNDER
SECTIONS 9 AND 3(B) OF THE NLRA

Introduction

Pursuant to Section 102.69 (a) of the National Labor Relations Board's Rules and Regulations and Section 11392.4 of its Case Handling Manual, Employer C.R. England has today filed with Region 13 Objections to Election in the above-referenced case.

This memorandum of law addresses Employer's first objection—that under the Supreme Court's decision in *New Process Steel*, 130 S.Ct. 2365 (2010) and the *Noel Canning v. NLRB* decision, No. 12-1115 (D.C. Cir. January 25, 2013), the Board's appointment of Regional Director Peter Orr on December 13, 2011, was invalid and lacked authority. Therefore, purported Regional Director Orr lacked authority to conduct and supervise a valid election in this matter under Sections 9 and 3(b) of the National Labor Relations

Act (the “Act” or the “NRLA”) and further lacks authority to process these objections or, if warranted, to issue a certification in this matter under Section 9 and the Board’s rules.

Argument

On March 23, 2010, the United States Supreme Court handed down a decision in *New Process Steel v NLRB*, 130 S.Ct. 2635. Despite language in the last sentence of Section 3(b) of the Act that two members of the Board may constitute a quorum for certain purposes, the Supreme Court held that in order for the Board to act validly and with authority under the Act, the Board’s power must be vested continuously in a group of three members, because such a requirement is the only way to harmonize and give meaningful effect to all of the provisions of Section 3(b). The decision in *New Process Steel* had been issued by a two-member Board comprised of Wilma Liebman and Peter Schaumber. The Court ruled that this two-member Board was devoid of a quorum as required by Section 3(b) and therefore the Board’s decision in *New Process Steel* was vacated and remanded for further proceedings consistent with the Supreme Court’s decision. After the Court’s decision, numerous other decisions issued by the two-member Board of Liebman and Schaumber (they had issued nearly 600 decisions over a 27-month period) that were on appeal in the federal courts, were also vacated and remanded for further action consistent with the Supreme Court’s decision in *New Process Steel*.

Peter Orr purportedly was appointed as Regional Director of Region 13 of the National Labor Relations Board on December 13, 2011, by a purported Board comprised of Chairman Mark Pearce and Members Craig Becker and Brian Hayes. Members Pearce and Hayes had been appointed to the Board by President Obama and were confirmed

with the advice and consent of the United States Senate under the United States Constitution. Mr. Becker, however, had been an intrasessional recess appointee of President Obama and never was confirmed as a member of the Board with the advice and consent of the Senate.

On January 8, 2013, Teamsters Local 705 in Chicago filed a petition for representation to open the instant R Case, No. 13-RC-095967. The parties reviewed the proposed voting unit and agreed there were no issues that required a hearing as to the appropriate unit for voting. Therefore, the parties agreed to a Stipulated Election Agreement that the purported Regional Director, Mr. Orr, purportedly “approved” on January 17, 2013.

Indeed, a valid approval of a stipulated election agreement by a regional director with authority under the Act is required by Section 9 of the Act, Section 102.69 of the Board’s rules and Section 11312 of its Case Handling Manual. In order for a valid election to take place, Section 102.69 of the Board’s rules are clear that the election “shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.”

On January 25, 2013, Chief Judge Sentelle and two associate judges, Henderson and Griffith, of the United States Court of Appeals for the District of Columbia, handed down the Court’s decision in *Noel Canning v NLRB*. The appeal in the case was a challenge to the quorum and authority of the Board in the case under *New Process Steel*. The *New Process Steel* issue was presented because two purported members of the current Board, Richard Griffin and Sharon Block, purportedly were recess-appointed by President

Obama at a time, the appellant argued, when the Senate was not in fact in recess. The D.C. Circuit resolved the issue on a more-sweeping basis than had been presented by the appellant. The Court found that purported members Griffin and Block were invalidly appointed and there was no quorum at the time they issued their decision in *Noel Canning*, because they were intrasessional recess appointees. The Court concluded that the United States Constitution is clear that a recess appointment is valid only if the vacancy filled arises and is filled during an intersessional recess of the U.S. Senate. This did not occur with the purported members Griffin and Block.

The principle of *Noel Canning* is equally applicable to invalidate any decision or action of a three-member panel of the Board on which purported member Craig Becker participated. Indeed, this would appear to be the consistent view of at least a majority of the judges on the D.C. Circuit, not merely the three-judge panel in *Noel Canning*. On February 19, 2013, the same day as the election in the instant R case in Region 13, a different panel of the D.C. Circuit issued an order on its own motion in No. 12-5250, in light of the opinion and judgment issued in *Noel Canning*, that the highly-watched appeal of the U.S District Court's invalidation of the Board's new union representation election rules (the so-called "expedited election" rules issued in December 2011), was "removed from oral argument" and would be "held in abeyance pending further order of the court."

For our purposes here, this latest action by the D.C. Circuit is paramount, because the union representation election rules now held in abeyance in light of *Noel Canning* were issued by Chairman Pearce and purported member Craig Becker, an intrasessional recess

appointee. This means that *Noel Canning* must be applied to invalidate any action taken by the three-member Board that included purported member Becker. As noted, the expedited election rules now held in abeyance by the D.C. Circuit in light of *Noel Canning* were purported issued by a purported Board that included purported member Becker in December 2011, at approximately the same time that he purportedly participated in the appointment of the purported regional director of Region 13, Peter Orr.

For the election in the current matter to have been validly conducted, and for any further action by the regional director in this matter to be valid, Mr. Orr must have been a valid appointee of a valid Board. It has been well understood for decades that a regional director has two functions—the representation case function (that Mr. Orr purportedly was exercising in the instant case) and the unfair labor practice case function. Due to the Taft-Hartley Act’s separation between the Board and the General Counsel, the General Counsel may not empower a regional director to perform representation case functions. Only the Board can do that, and it is Employer’s argument that an invalid Board (such as the one consisting of Members Pearce, Hayes and purported member Becker in December 2011) could not empower purported regional director Orr to perform representation case functions under Section 9 and the Board’s own rules.

Section 9 is clear that it falls within the authority of “the Board [not the General Counsel] . . . to direct an election by secret ballot and to certify the results thereof.” Section 4 of the Act is plain that “the Board shall appoint the regional directors” Section 3 (b) provides that “The Board is authorized to delegate to its Regional Directors its powers

under Section 9 . . . to direct an election or take a secret ballot.” Consistent with these provisions of the Act, section 102.69 of the Board’s rules provide it is the Regional Director who must conduct the election, certify the results, initiate investigations of objections, and issue reports on objections. If the Regional Director has not been validly appointed by a valid Board, any and all such actions by the Regional Director in an R case are invalid and lack authority.

Conclusion

Mr. Orr was invalidly appointed as Regional Director by an invalid Board in December 2011. His actions thus far in the instant case have lacked authority, and the election administered with his direction and approval on February 19 is null and void, because it was administered without authority. Any further action taken by Mr. Orr in this R case will also be without authority. This entire proceeding should be held in abeyance until there is a regional director who is validly appointed in Region 13 by a valid Board for the purpose of conducting the representation case functions of the Board. If and when a valid regional director is appointed by a valid Board, for the purpose of conducting the representation case functions in this case, the previously-held, invalid election should be rerun.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark B. Goodwin". The signature is written in a cursive, flowing style.

Mark B. Goodwin

Counsel for Employer C.R. England, Inc.

February 26, 2013

CERTIFICATE OF SERVICE

I certify that on March 27, 2013, I electronically filed the foregoing Exceptions of Employer to Purported Regional Director Peter Orr's Report on Objections **and** Memorandum of Law in Support of Employer's Objections to Election Due to Invalid Appointment and Lack of Authority of Regional Director to Conduct and Supervise a Valid Election under Sections 9 and 3(B) of the NLRA, with the National Labor Relations Board, Washington, D.C., via the Board's E-Filing System. A copy of these documents has also been served on the following parties in the manner indicated:

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